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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91210506
Party	Plaintiff Ovation LLC
Correspondence Address	PAUL A BOST SHEPPARD MULLIN RICHTER & HAMPTON LLP 1901 AVENUE OF THE STARS, STE 1600 LOS ANGELES, CA 90067 UNITED STATES pbost@smrh.com, lthompson@smrh.com, jpietrini@smrh.com, lmartin@smrh.com, mdanner@smrh.com, rwalsh@smrh.com
Submission	Reply in Support of Motion
Filer's Name	Paul A. Bost
Filer's e-mail	pbost@smrh.com, jpietrini@smrh.com, lmartin@smrh.com, mdanner@smrh.com, lthompson@smrh.com
Signature	/Paul A. Bost/
Date	05/27/2015
Attachments	Reply Brief ISO Motion to Compel.pdf(188994 bytes )

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

<p>In re Matter of Application No. 85/569,798 for the mark: POP OF CULTURE</p> <p>In re Matter of Application Nos. 85/937,423 and 85/937,399 for the mark: E POP OF CULTURE</p> <p>Ovation LLC,</p> <p style="text-align: center;">Opposer,</p> <p style="text-align: center;">vs.</p> <p>E! Entertainment Television, LLC,</p> <p style="text-align: center;">Applicant.</p>	<p>Opposition No. 91-210506 (parent) Opposition No. 91-217286 Opposition No. 91-217287</p> <p><b>OPPOSER OVATION LLC’S REPLY BRIEF IN SUPPORT OF ITS MOTION TO COMPEL RESPONSES TO INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS AND MOTION TO TEST THE SUFFICIENCY OF RESPONSES TO REQUESTS FOR ADMISSION</b></p>
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**I. INTRODUCTION**

Opposer Ovation LLC’s (“Opposer”) motion to compel sets forth many instances in which Applicant E! Entertainment Television, LLC (“Applicant”) has failed to abide by its discovery obligations. Applicant admits this fact by agreeing to supplement many of its deficient discovery responses in its opposition brief. However, in order to misdirect the Board away from the merits of Opposer’s motion, Applicant argues that Opposer filed its motion in order to delay the deposition of its principals. This is a red herring; Opposer’s motion is entirely irrelevant to the deposition notices Applicant served and their sufficiency (or lack thereof). Instead, Opposer’s motivation for filing its motion is self-evident; the parties’ settlement negotiations had reached an impasse, discovery was closing, and Applicant’s full and complete responses to many of Opposer’s discovery requests were still outstanding. Also, Applicant’s claim that Opposer failed to meet and confer with Applicant is baseless, especially given Applicant’s own meet and

confer efforts, which were far less robust than Opposer's (e.g., Applicant never identified in writing which of Opposer's discovery responses were allegedly deficient). Nevertheless, Applicant's meet and confer efforts were deemed sufficient by the Board. Accordingly, Applicant should be precluded from arguing that Opposer failed to meet and confer when its own meet and confer efforts were demonstrably inferior to those of Opposer's.

## **II. OPPOSER'S REQUESTS FOR ADMISSION ("RFA")**

Preliminarily, Applicant's argument that the Board granted it an extension of time to respond to Opposer's First Set of RFAs is incorrect. This is because Applicant never requested an extension of time to respond to Opposer's First Set of RFAs, instead only requesting an extension of time to respond to Opposer's "January 24, 2014 discovery requests," i.e., Opposer's First Sets of Interrogatories and Requests for Production ("RFPs"). *See* Docket No. 13, p. 22. Opposer served its RFAs on February 12, 2014, not January 24, 2014. Thus, as a matter of law, Opposer's RFAs should be deemed admitted by Applicant. *See* Fed.R.Civ.P. 36(a)(3).

### **A. RFA Nos. 18, 39, 41-42, and 45-46**

Applicant's argument that Opposer did not meet and confer with respect to these RFAs is belied by Opposer's meet and confer letter of July 1, 2014, which expressly addresses these particular RFAs. (Bost Decl. ¶ 8, Ex. I, p. 9.) Having not sufficiently supplemented its responses in the manner requested by Opposer, Opposer is justified in moving to test the sufficiency of Applicant's compliance with its discovery obligations as relates to these RFAs. Notably, Applicant does not otherwise dispute the merits of Opposer's motion as relates to these RFAs.

### **B. RFA Nos. 44, 50, and 55**

Applicant does not deny that it made certain admissions in its initial responses to these RFAs which it later withdrew in supplemental responses without filing a motion pursuant to Fed.R.Civ.P. 36(b). Accordingly, Applicant's initial admissions should stand. Although Applicant now promises that it will provide supplemental responses to these RFAs, the Board should expressly prohibit Applicant from providing admissions any narrower than those it

originally provided in response to these RFAs absent Applicant's filing of a motion pursuant to Fed.R.Civ.P. 36(b).

**C. RFA Nos. 62, 64, 68, 70, 72, 74, 76, 78, 91, 93, 95, 97, 99, 102, 103, 105, 113, and 114**

Again, Applicant's contention that Opposer did not meet and confer with Applicant with respect to these RFAs is belied by Opposer's letter of July 1, 2014, which expressly addresses these particular RFAs. (Bost Decl. ¶ 8, Ex. I, p. 2, n.1.) Thus, although the issue is essentially mooted by Applicant's belated agreement to supplement its responses to these RFAs, Applicant's suggestion that Opposer failed to meet and confer as to these RFAs is demonstrably false.

**III. OPPOSER'S INTERROGATORIES**

**A. Interrogatory Nos. 2 and 3**

Contrary to Applicant's assertion otherwise, the date(s) of first use of a mark and the date(s) of first sale of goods offered thereunder is not only relevant to the issue of priority. As explained by Opposer in its motion, how long a mark has been used in commerce and the manner of said use is critical to determining if there have been adequate opportunities for actual confusion to occur in the marketplace. *See Maker's Mark Distillery, Inc. v. Diageo North America, Inc.*, 679 F.3d 410, 422 (6th Cir. 2012) ("Here, the [accused] product was sold for a short time and in limited quantities; under these circumstances, it is reasonable that no meaningful evidence of actual confusion was available.") Opposer is entitled to know the dates(s) of first use of Applicant's marks and the date(s) of Applicant's first sale for each good and service offered thereunder.

**B. Interrogatory No. 9**

Applicant has effectively mooted Opposer's motion with respect to this interrogatory by agreeing to supplement its response. In addition to identifying the person who learned of Opposer's mark and how such person learned of the mark, Applicant must also identify whether

this information was known to it prior to its adoption of its marks and applications to register the same.

**C. Interrogatory No. 12**

This interrogatory seeks Applicant's disclosure of the amount it has spent to advertise, promote, or market the goods and services it has offered under its marks. Applicant's position that Opposer's interrogatory cannot include amounts spent to promote and advertise Applicant's first use because these amounts were, by definition, spent prior to Applicant's first use is the result of an unnatural reading of the interrogatory. The Board should not countenance this sort of gamesmanship. Also, Opposer's interrogatory is not rendered overbroad and burdensome because Applicant has allegedly adopted the POP OF CULTURE mark as its "tagline." Instead, Applicant, pursuant to its discovery obligations and TBMP § 414(18), must disclose this information to Opposer.

**D. Interrogatory No. 19**

Without admitting that its original interrogatory is overbroad, Opposer agrees to narrow its interrogatory to seek Applicant's identification and description of all cross-marketing agreements, website linking agreements, promotion agreements, sponsorship agreements, or other marketing or advertising arrangements between Applicant and any third party resulting in the use of Applicant's marks on advertisements or promotional materials. Applicant's response should include any agreements it entered relevant to the advertising efforts it disclosed in its response to Opposer's interrogatory No. 17, i.e., "an advertising campaign including . . . print ads, online units, cover wraps in AdWeek and AMNY, online campaigns (on Adweek.com, Cynopis, Deadline, TVLine, HuffingtonPost, LinkedIn, MediaPost, NYMagazine, Hollywoodreporter) [and] building signage (interior and exterior)."

**E. Interrogatory No. 20**

Opposer disagrees with Applicant's position that Opposer's mark is the only keyword and electronic tag that Opposer is entitled to discover. Nevertheless, in the interest of reaching an amicable resolution of this issue, Opposer will narrow this interrogatory to seek only

keywords and electronic tags that include Opposer's mark or marks similar thereto or any other references to Opposer, i.e., the name "ovation."

**F. Interrogatory No. 24**

In this interrogatory, Opposer requests Applicant's disclosure of certain facts related to alleged third party uses of "POP CULTURE-formative marks." Applicant claims that this information is "beyond the scope of discovery" because this information is "not within [Applicant's] possession, custody, or control, and [Applicant] has no actual knowledge of a third party company's advertising budget or entire scope of use." (Opposition Brief, p. 15.) Applicant is wrong. Just because Applicant contends it does not have this information does not make it "beyond the scope of discovery." On the contrary, Opposer propounded this interrogatory precisely to determine what information Applicant was in possession of with respect to these alleged third party uses. Applicant must supplement its response to make of record what it has stated in its opposition brief, that is, that Applicant has no actual knowledge of the scope of use and recognition of these alleged third party uses.

**G. Interrogatory No. 31**

As noted above, Opposer's interrogatory – which seeks Applicant's disclosure of the total revenue generated from services offered under its marks at issue – is not rendered overbroad and burdensome because Applicant has allegedly adopted the POP OF CULTURE mark as its "tagline." Instead, Applicant, pursuant to its discovery obligations and TBMP § 414(18), must disclose this information to Opposer. To the extent Applicant takes the position that such revenue is tantamount to "all revenue generated by the entire company" (Opposition Brief, p. 16), Applicant must disclose the same to Opposer.

**H. Interrogatory No. 32**

This interrogatory requests Applicant's identification of all persons who provided information for its responses to Opposer's interrogatories, RFPs, and RFAs. Applicant willfully obfuscates this straight-forward interrogatory. Opposer is not requesting that, for example, Applicant identify any person that might have had a hand in the creation of any document

responsive to Opposer's RFPs. Instead, and quite clearly, Opposer requests Applicant's identification of those individuals who provided information specifically for its discovery responses in this case. Further, Applicant's argument that this interrogatory requests privileged information is nonsensical; this interrogatory does not seek the disclosure of any information but merely the names of persons.

#### **IV. OPPOSER'S RFPS**

##### **A. RFP Nos. 7, 14-16, 21, 22, 24, 29, 32, 33, 36, 45-49, and 54**

Applicant is incorrect that, pursuant to its obligation to supplement its responses pursuant to Fed.R.Civ.P. 26(e), it can withdraw its agreement to produce documents responsive to RFPs. Fed.R.Civ.P. 26(e) exists to benefit the propounder of discovery and entitles it to information responsive to its discovery requests that comes to light after responses are served. *See* 1970 Advisory Committee Notes to Fed.R.Civ.P. 26(e) ("The rules do not now state whether interrogatories (and questions at deposition as well as requests for inspection and admissions) impose a 'continuing burden' on the responding party to supplement his answers if he obtains new information. The issue is acute when new information renders substantially incomplete or inaccurate an answer which was complete and accurate when made. It is essential that the rules provide an answer to this question.") Fed.R.Civ.P. 26(e) is not, as Applicant suggests, meant to be used as a shield against disclosure.

Likewise, Applicant's prior agreement to, subject to its boilerplate objections, produce documents responsive to these RFPs cannot be termed, per Fed.R.Civ.P. 26(e), "incomplete or incorrect" responses subject to supplementation. Applicant cannot identify any "new information" it has learned since serving its responses rendering its original responses "incomplete or incorrect." Instead, Applicant is asserting a legal position that it waived by failing to assert it earlier. Finally, Applicant's position, if accepted, would result in widespread abuse, where respondents, as a matter of course, could withdraw prior agreements to produce responsive documents based on prior asserted boilerplate objections. Clearly, if a respondent is going to refuse to provide responsive documents altogether on the basis of its objections, it must

take this position in its initial response. *See* Fed.R.Civ.P. 34(b)(2)(C) (“An objection to part of a request must specify the part and permit inspection of the rest.”)

The Board should order Applicant to produce documents as stated in its original responses.

**B. RFP No. 10**

There can be no debate that a party’s *intended* channels of distribution are relevant to the question of likelihood of confusion. Such facts are relevant to, among other *du Pont* factors, the extent of possible confusion. *See In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357 (C.C.P.A. 1973); *see also Franklin Research Co. v. Dust-Tex Corp.*, 138 U.S.P.Q. 394, 396 (TTAB 1963) (“Applicant’s ‘DUST-TEX’ mops, mop heads, dust cloths, treatment preparations and opposer’s ‘DUSTCHEK’ emulsions, dust cloths and mops, although presently distributed through different channels of trade, are nevertheless intended essentially for the same purposes by the same ultimate users, namely, building operators, building maintenance operators, janitors, and like persons. Accordingly, the use of the same or similar marks in connection with such goods is reasonably likely to cause such persons to ascribe a common origin thereto.”) (emphasis added) Such facts are also relevant to assessing the probativeness of any evidence of actual confusion, or lack thereof. The relevance of a party’s intended channels of distribution for its goods or services is particularly clear in this case, as one of Applicant’s applications at issue was filed on an intent-to-use basis.

**C. RFP No. 40**

Applicant’s claim that Opposer failed to meet and confer as to this RFP is, again, baseless. Opposer specifically addressed Applicant’s refusal to produce documents responsive to this RFP in its meet and confer letter of July 1, 2014. (Bost Decl. ¶ 8, Ex. I, pp. 6-7.) Also, the RFP is not overly broad, as TBMP § 414(10) expressly sanctions discovery into “contractual agreements between a responding party and third parties based on the responding party’s involved mark.” Such agreements include license agreements, but are not limited to license



agreements. Applicant should not be allowed to evade producing documents within the scope of relevant information

**D. RFP No. 42**

This RFP plainly requests Applicant's production of communications it has had regarding Opposer or its CULTUREPOP mark. Applicant does not attempt to justify its refusal to produce such communications other than to say that some of these communications are subject to the attorney-client privilege. This is irrelevant; Opposer is not requesting Applicant's production of privileged communications. The Board must compel Applicant to identify whether it is in possession, custody, or control of responsive, non-privileged communications, and, if so, to produce them.<sup>1</sup>

**E. RFP Nos. 58-76**

Each of Opposer's RFPs at issue request Applicant's production of documents relevant to a discrete issue in the parties' pleadings or Applicant's letter to Opposer of May 18, 2012. As such, the case law on which Applicant relies supports the validity of Opposer's RFPs. In *Hiskett v. Wal-Mart Stores, Inc.*, 180 F.R.D. 403, 405 (D. Kan. 1998), the court noted that discovery requests "which do not encompass every allegation, or a significant number of allegations, of the Complaint, reasonably places upon the answering party 'the duty to answer them by setting forth the material or principal facts.'" [internal citation omitted.] Accordingly, the *Hiskett* court ordered plaintiff to "identify the witnesses and documents" supporting her allegation that she was denied employment in violation of the Civil Rights Act of 1964 and the Kansas Act of Discrimination. *Id.* In *Geiger v. Z-Ultimate Self Def. Studios LLC*, 2015 WL 1598092, at \*13

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<sup>1</sup> Applicant complains that Opposer's request necessitates Applicant's creation of a "privilege log of communications for over two years where [Applicant] has communicated regarding [Opposer's] legal positions regarding likelihood of confusion." (Opposition Brief, p. 21.) Applicant cannot avoid its responsibilities to provide a privilege log pursuant to Fed.R.Civ.P. 26(b)(5)(A)(ii). See Docket No. 18 (order of Board noting the parties' obligations to produce a privilege log as applicable). Furthermore, Opposer has served on Applicant a privilege log logging its communications prior to its initiation of these proceedings that were subject to the attorney-client privilege or attorney work product doctrine. Just as Opposer has complied with its obligations under Fed.R.Civ.P. 26(b)(5)(A)(ii), so should Applicant.

(D. Colo. Apr. 9, 2015), the court ruled the following RFP overbroad: “any document that supports your response to any interrogatory or admission or supports any affirmative defense.” Opposer’s RFPs are clearly more similar to the *valid* discovery request at issue in *Hiskett*, not the invalid request at issue in *Geiger*, and, thus, are not objectionably overbroad.

Moreover, Applicant’s position is contradicted by its own requests for production, which included at least one RFP **identical** in scope and format to Opposer’s RFP Nos. 58-76, e.g., Applicant’s RFP No. 25 requesting Opposer’s production of “[a]ll documents relating to Opposer’s allegation in Paragraph 7 of the Notice of Opposition that [Applicant’s] use of the POP OF CULTURE Mark is likely to cause confusion, mistake or deception as to the source or origin of [Applicant’s] goods and services offered under the POP OF CULTURE Mark.” Applicant is estopped from objecting to Opposer’s RFP Nos. 58-76 because it has sought discovery from Opposer in precisely the same manner.

**F. RFP Nos. 78 and 82**

Applicant does not dispute that Opposer is entitled to documents reflecting its royalty and advertising revenue earned or generated from the offering of services under its marks at issue. Instead, Applicant argues that Opposer is only entitled to these amounts in “round numbers” and that Opposer is not entitled to the royalty statements themselves or other direct evidence of payment. In the interest of compromise, Opposer will limit its requests to documents reflecting Applicant’s royalty and advertising revenue earned or generated from the offering of services under its marks at issue in round numbers.

**G. RFP No. 81**

Likewise, Applicant does not dispute that Opposer is entitled to documents demonstrating Applicant’s uses of its marks in connection with streaming or broadcasting services to the internet or to mobile devices. Accordingly, Opposer, in the interest of compromise, agrees to limit its request to the production of such documents.

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**H. RFP Nos. 2, 9-10, 12, 18, 23, 25, 28, 31, 37, 50-52, 57, 77, and 79-80**

Applicant does not dispute that it has failed to produce documents responsive to these RFPs even though more than a year has passed since it agreed to do so. Instead, Applicant falls back on its argument that Opposer failed to meet and confer with Applicant regarding this particular discovery issue. Like its other meet-and-confer-related arguments, Applicant's argument is meritless. First, in its first meet-and-confer letter of April 29, 2014, Opposer requested Applicant's production of all responsive documents. (Bost Decl. ¶ 5, Ex. D, p. 1.) Second, Opposer and Applicant discussed the status of Applicant's document production – or the deficiencies thereof – during their telephonic meet and confer of July 22, 2014. Finally, Applicant should not be allowed to delay resolution of this issue based on an alleged failure to meet and confer by Opposer. Instead, the Board should simply order Applicant to finally produce the many documents it represented it would produce more than 12 months ago but which it has failed to produce without explanation or justification.

**V. CONCLUSION**

For all of the above reasons, Opposer's motions should both be granted in their entirety.

Respectfully submitted,

SHEPPARD MULLIN RICHTER & HAMPTON, LLP

Dated: May 27, 2015

By: /s/Paul A. Bost  
Jill M. Pietrini  
Whitney Walters  
Paul A. Bost

*Attorneys for Applicant*  
Ovation LLC

**CERTIFICATE OF ELECTRONIC FILING**

I hereby certify that this **OPPOSER OVATION LLC'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO COMPEL RESPONSES TO INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS AND MOTION TO TEST THE SUFFICIENCY OF RESPONSES TO REQUESTS FOR ADMISSION** is being submitted electronically to the Commissioner for Trademarks, Trademark Trial and Appeals, through ESTTA, on this 27<sup>th</sup> day of May, 2015.

/s/Lynne Thompson

Lynne Thompson

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing **OPPOSER OVATION LLC'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO COMPEL RESPONSES TO INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS AND MOTION TO TEST THE SUFFICIENCY OF RESPONSES TO REQUESTS FOR ADMISSION** is being deposited as first class mail, postage prepaid, in an envelope addressed to:

Michael J. McCue  
LEWIS ROCA ROTHGERBER LLP  
3993 Howard Hughes Pkwy, Ste 600  
Las Vegas, NV 89169

on this 27<sup>th</sup> day of May, 2015.

/s/Lynne Thompson

Lynne Thompson

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